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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 394

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EXPRESS PUBLISHING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered on June 12, 1942, dismissing the Board's petition that the Express Publishing Company be adjudged in contempt for violating a decree entered by that court which enforced a bargaining order issued by the Board against the Company (R. 304).

OPINION BELOW AND PRECEDING OPINIONS

The opinion of the circuit court of appeals on the present contempt application (R. 300–304) is not yet reported. The opinions of the circuit court of appeals and of this Court in the preceding en-

forcement proceeding are reported, respectively, in 111 F. (2d) 588, and 312 U. S. 426. The decision of the Board prior to the enforcement proceeding is reported in 13 N. L. R. B. 1213.

JURISDICTION

The judgment of the circuit court of appeals (R. 304) was entered on June 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925,[1] and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

Whether the circuit court of appeals acted arbitrarily and in abuse of the functions entrusted to it under the National Labor Relations Act in holding that the employer was not in contempt of the court's decree.

A subsidiary question raised by the decision below is whether the circuit court of appeals may refuse to adjudge an employer in contempt where the employer's conduct, subsequent to the issuance of the court's decree, is substantially similar to that adjudged to be violative of the Act in the proceedings which led to the entry of the decree.

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[1] This Court has jurisdiction in the present proceeding under Section 240 (a) of the Judicial Code, as amended. See *St. Louis, K. C. & C. R. R. Co.* v. *Wabash R. R. Co.*, 217 U. S. 247, 251; *In re Chetwood*, 165 U. S. 443, 462.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix, *infra,* pages 19–20.

STATEMENT

On July 28, 1939, the Board issued its Decision and Order (13 N. L. R. B. 1213) requiring Express Publishing Company, and its officers, agents, successors, and assigns to cease and desist from engaging in certain unfair practices; upon request to bargain collectively with the San Antonio Newspaper Guild (herein called the Guild) and embody any understanding reached in a signed agreement; and to post notices. Upon petition of the Board for enforcement of its order, the Fifth Circuit on May 7, 1940, rendered its opinion (111 F. (2d) 588) and entered its Decree (R. 2–3) modifying the Board's order to eliminate the cease and desist and the posting of notices provisions, but enforcing the affirmative bargaining provisions. On writ of certiorari granted on the Board's application, this Court on March 3, 1941, handed down its opinion (312 U. S. 426) directing certain modifications in the Board's order not material to the bargaining provisions of the order, and otherwise enforcing the order. On June 17, 1941, the Fifth Circuit entered its Decree on Mandate (R. 3–6) in conformity with the opinion of this Court, including

an affirmative collective bargaining requirement identical with that contained in the decree of May 7, 1940, in addition to a notice posting requirement and injunctions to cease and desist from refusing to bargain collectively and from interfering with the efforts of the Guild to bargain collectively.

Thereafter the Company and the Guild met in four post-decree conferences. There is no dispute as to the facts, for the four conferences are stenographically reported (R. 17–260). In summary, the conferences proceeded as follows:

At the first conference, on April 7, 1941, the Guild submitted a lengthy proposed agreement (R. 19–33). In response the Company read a prepared statement setting forth objections to the proposed agreement (R. 33–34). The prepared statement concluded as follows:

> Apart from the details of the proposed agreement, it is our belief that the first question to be considered is whether it is to the interests, either of the publisher or the employees in the editorial departments, to establish arbitrary rules governing the terms of employment. In professional work of this character, is it not best to leave to both parties entire freedom of action, thus preserving to the publisher the freedom of its press and control of its editorial and news policies, and at the same time leaving to the employees full freedom to resign from their employment whenever the terms of employ-

> ment are not satisfactory to them. Under such an arrangement both the publisher and the employees would retain their complete freedom of action, except, of course, that the publisher, in accordance with its present practice, would not discriminate as between Guild and non-Guild members.

This quotation, as the facts will show, represented the Company's underlying position to which it adhered throughout all the conferences.

After reading its prepared statement, the Company orally reiterated that it rejected the Guild's proposal, whereupon the Guild withdrew it (R. 35). The Company expressed its willingness to submit a counterproposal, but the Guild stated it would rather itself submit a second proposal to the Company (R. 42). When the Guild asked, however, what provisions in its first proposal would be acceptable to the Company for inclusion in the second proposal, the Company again declared that, in its view, it was "more important than any particular detail" to determine whether "arbitrary rules governing terms of employment" should be established, "whether both sides are not better off without some agreement fixing wages according to longevity of service, or any other arbitrary rule; and fixing employment or discharge in that way" (R. 45–46). It further stated its view to be that "without fixed contracts," there is "more security, and it is better to the interests of both parties" (R. 46). The Guild expressed its disagreement

with that view (R. 48–49), and the conference ended.

At the second meeting held on April 14, at which the Guild submitted its second proposed agreement (R. 54–61), the Company again read a prepared statement rejecting it as a whole (R. 61–63). The provisions were then taken up and discussed paragraph by paragraph (R. 66–131). Throughout the conference, the Company reiterated its opposition to "any of these fixed scales" (R. 95, 131), to making a contract that "put it in a strait jacket" (R. 88, 95), and to assuming any binding obligations concerning wages, pay cuts, pay increases, severance pay, vacations, and discharges (R. 78, 88–89, 95, 101, 104, 105–106, 114, 115–116, 131–132); it also stated that it "reserves the right to terminate it [a contract] at any time" (R. 105). Of the approximately 40 sections of the Guild's proposed agreement, it pronounced unobjectionable only the provision excluding certain executive employees from the coverage of the agreement (R. 55, 72-73, 75, 76, 79–80); the section permitting employees to negotiate for individual increases (R. 56, 89–90); the requirement that a record of overtime be kept, which the Fair Labor Standards Act requires (R. 57, 92); the provision that a committee be appointed by the Guild to take up employee matters with the Company (R. 58, 108); and the clause that there should be no discrimination because of union membership, also of course required by law

(R. 60, 116). Even with respect to these "unobjectionable" provisions, however, the Company refused or evaded the Guild's requests that the Company initial the provisions as tentatively satisfactory pending agreement upon a whole contract (R. 73–78, 89–90, 92–94, 99, 106–107); it asserted that "a contract has to be agreed on as whole, or not at all" (R. 73, 76, 89, 92–93, 106).

During the meeting, the Company several times offered to prepare a counterproposal, and it was agreed that it should do so (R. 92, 106, 110–111, 130–131, 135).

On April 21, the parties met to consider the Company's "counterproposal" (R. 141–144). Its preamble expressly declared that "it is especially important that it [the Company] * * * not bind itself as to what action it will take from time to time in the future" (R. 141). In accordance with this premise none of the counterproposal's basic provisions committed the Company to anything for any length of time: Section A provided as to hiring, salaries, increases, vacations, sick leave, and discharges, that while it was the Company's "intention" to "pursue its long time and present policies," the Company nevertheless retained "complete freedom of action in such matters with power to employ and discharge and make changes in salaries at any time, either with or without notice, as it may deem best * * *" (R. 141), Section C rested the Company's "standard of rela-

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tionship to and dealing with" the employees upon their "loyalty, competency and usefulness * * * in the judgment of the management" (R. 142), Section E proposed certain terms of vacation with pay "until further notice from the Company" (*id.*), Section F granted sick leave with pay "for such period as the management shall decide in each particular case" (*id.*), Section G provided for severance pay "except in cases in which the circumstances do not warrant it as the management may decide" (R. 142–143), Section H stated that increases in pay "from time to time will be considered by the management in relation to business conditions affecting the Company" (R. 143), Section I provided that the management would arrange for reduction in force because of business conditions or changes in policy "whenever the Company deems advisable" (*id.*). During the ensuing discussions the Company, while asserting its openmindedness and willingness to be persuaded (R. 151–152, 159–160, 163, 171, 173–174), nevertheless adhered inflexibly to the terms of the counterproposal except only that it indicated its willingness to clarify one provision which might be misconstrued to prohibit peaceful picketing (R. 177–178). It reiterated the meaning of the counterproposal, declaring that "the Publisher alone should control what he is willing to pay" (R. 165); that "compensation and tenure of employment [should not] be regulated by fixed standards of

that sort" (R. 163); and that continuance of the "present conditions" was "subject to the will of either party to terminate them" (R. 176, 153). A principal ground on which it defended the counterproposal was that its terms were no different from those which each employee had previously secured for himself by individual bargaining (R. 146–147). The conference closed with the Company's statement that "at the present time * * * that is the best one [offer] we can make" (R. 183).

At the fourth meeting, held on April 29, the Company reiterated its original position that "it does not wish to bind itself for any specified length of time in the future. In other words, it wants to preserve its freedom of action in reference to making changes, both for itself and for the employees, each to have freedom of action" (R. 207). It repeated its "counterproposal"—that the existing oral arrangements with its employees, the varied terms of which had been fixed prior to the decree through individual bargaining (R. 209, 214–215, 216–217, 225, 240–241)—be incorporated by reference in a written contract running for no specified period but revocable at the Company's will (R. 207, 208, 210–211, 225). It met the Guild's protests that the "counterproposal" bound the Company to nothing and was not an agreement in any meaningful sense (R. 231–232, 257–258) by stating that "individual contracts made by employees throughout the United States * * * were very much

to the same effect" (R. 211); that the counterproposal accorded "advantages" in that it preserved "freedom of action in the future. The employees can quit if they like, and the employer can quit" (R. 228); that "when people try to fix a moment for their contract to run out they do not get security" (R. 230); and that while the Company "reserve[d] to itself what compensation it is willing to pay, * * * the other side to the contract reserve [d] * * * the right to determine whether they are willing to accept it * * *" (R. 242). The Company conceded that it could, a week after the counterproposal was signed, "reduce a particular individual's wage by a particular sum," but avowed that the other contracting party "would have likewise the same control over whether it was willing to accept it" (R. 242–243). After prolonged discussion, the conference closed with the Company's refusal to make "any changes" in its counterproposal (R. 255) and its assertion that "arbitrary standards for increase and decrease in pay and tenure of employment" would place employers "in a strait jacket" (R. 256).

In its petition filed August 26, 1941, the Board alleged that the Company and its officers and agents by their conduct of the negotiations had failed and refused to bargain collectively in good faith as commanded by the decree (R. 1–13); it asked that the Court adjudge the Company and its officers and agents in contempt, and take action to

make the decree effective (R. 12). On the same day, the court issued a rule, directed to the Company and its officers and agents, in particular its president and its secretary, to show cause why they should not be adjudged in contempt (R. 261). On October 30, 1941, the Company and the said two officers filed their answers to the Board's petition (R. 263–296). and thereafter the two officers also filed supporting affidavits (R. 297–299). On December 1, 1941, the court heard oral argument, and later in December received the briefs of the parties. On July 12, 1942, the court handed down its opinion holding that the allegations of contempt were not sustained by the proof (R. 300–304) and on the same day entered its judgment dismissing the petition (R. 304).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in failing to hold that the Company's conduct violated the court's decree.

REASONS FOR GRANTING THE WRIT

The National Labor Relations Act depends for its effective enforcement upon the exercise by the circuit courts of appeals of their contempt powers: the Board's order is not enforced until it is actually obeyed (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 269–270) and Congress clearly relied upon the remedy of contempt as the ultimate sanction to secure obedience. The circuit courts are therefore charged under the stat-

utory scheme with the duty of properly applying their contempt authority. This duty was not discharged in the instant case.

1. The determination of this case involved no problems of credibility. It presented only the simple question whether the Company's conduct, concerning which there is no factual dispute, constituted a failure to bargain in violation of the decree. Since the decree enjoined the Company from refusing to bargain in contravention of the Act, the holding that the Company was not in contempt necessarily implies that its behavior in the above-described negotiations satisfied the requirements of Section 8 (5). This conclusion is plainly in defiance of all settled standards as to the content of the obligation to bargain collectively under the Act.

The consistent decisions of the Board [2] and the principles stated by this Court [3] and the circuit courts of appeals in cases too numerous to mention [4] establish that a good faith effort to negotiate

[2] See *Third Annual Report of the National Labor Relations Board* (1938) pp. 94, 96–97, 102–105; *Fourth Annual Report of the National Labor Relations Board* (1939) pp. 66–68; *Fifth Annual Report of the National Labor Relations Board* (1940) pp. 43–45, 46–49; *Sixth Annual Report of the National Labor Relations Board* (1941) p. 51.

[3] See e. g., *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236.

[4] See *Fourth Annual Report of the National Labor Relations Board* (1939) pp. 137–138; *Fifth Annual Report of the National Labor Relations Board* (1940) pp. 100–101; *Sixth Annual Report of the National Labor Relations Board* (1941) p. 93.

and to enter into binding agreements concerning wages, hours, and other terms and conditions of employment is the basic requisite of Section 8 (5).

The uncontroverted facts show that the Company here not only undeviatingly declined to negotiate concerning the normal subjects of collective bargaining because of its view that any standards or scales whatever were inappropriate (*supra*, pp. 4–5, 6), but it further struck at the very heart of the bargaining process by its flat refusal to bind itself with respect to the principal terms of employment, even if an agreement could be reached. Its position throughout was that it must retain complete freedom to do whatever it pleased whenever it chose in respect of any of the major conditions concerning which the Guild sought to bargain. Even in respect of the conditions embodied in its own counterproposal, the Company would not commit itself: It qualified every important condition with a clause leaving the matter to be continued, to be modified, or to be abandoned at its own complete discretion and at its sole pleasure. In brief, its position was that even if agreement were reached concerning any condition, it would not be bound. The result was simply a demand on the Company's part that the Guild sign away its statutory right to bargain in the future by agreeing to permit the Company to make any changes unilaterally and without reference to the Guild at all.

This was neither the form nor the substance of collective bargaining. The Seventh Circuit

in *National Labor Relations Board* v. *Boss Mfg. Co.*, 118 F. (2d) 187, 189 (C. C. A. 7) has specifically held substantially similar employer conduct to constitute contempt of its decree. Similarly, other circuit courts of appeals have also frequently decided, on proceedings for enforcement of the Board's order, that closely comparable company refusals to contract for any definite period with respect to wages, hours or other conditions of employment because of the alleged nature of their business violated Section 8 (5) of the Act. *National Labor Relations Board* v. *Westinghouse Air Brake Co.*, 120 F. (2d) 1004, 1006 (C. C. A. 3); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 634–639 (C. C. A. 4); *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. (2d) 131, 136–139 (C. C. A. 7), certiorari denied, 313 U. S. 595. Cf. *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. (2d) 91, 94 (C. C. A. 5).[5]

[5] Illustrative of the extent to which the Fifth Circuit apparently considered itself free to diverge in this case from established standards of what constitutes collective bargaining is its statement that it postponed decision in this cause for 6 months until the Supreme Court decided *Fleming, Administrator* v. *Belo Corporation* "so that the parties might be better advised as to the kind of wages and hours contract which may or may not be entered into, in keeping with the Fair Labor Standards Act of 1938" (R. 303–304), and its observation that the proposed contract submitted by the Guild was "unreasonable" because it requested the closed shop and other provisions not "required by law" (R. 303). Cf. *National Licorice Company* v. *National Labor Relations Board*, 309 U. S. 350, 360.

2. Review of the instant decision is clearly of critical importance to the administration of the Act. To hold, as the court did, that the Company's conduct in this case satisfies the decree and the Act is to render the entire proceeding nugatory and to defeat the enforcement of Section 8 (5) at its final and most critical point, the contempt stage. Unless this decision is reversed, the Congressional command of *bona fide* collective bargaining with the representative of the employees has as a practical matter been deleted from the Act in the Fifth Circuit.[6]

3. The instant decision also poses the question whether the circuit court may pronounce behavior substantially identical with that held by it to be violative of Section 8 (5) on proceedings for enforcement of the Board's order insufficient to sustain a petition in contempt; for, in overruling the Board's contention that the Company violated its decree, the court sharply departed from its own earlier decision in the principal cause, in which it held with respect to the closely analogous position taken by the Company in its negotiations with the Guild prior to the Board's order and the court's decree, that an employer is not free under Section 8 (5) to refuse to make a binding agreement at least

[6] Further, resolution of the conflict between the instant decision and the holding of the Seventh Circuit in the *Boss* case (*supra* p. 14) that similar employer conduct in negotiations with the representatives of its employees constituted contempt is necessary to ensure the uniform enforcement of the Act.

concerning matters which embody existing practice: "if [the Company] was unwilling to do more than maintain its present status, [it was required] to say so, and to express a willingness to have that as the agreement * * *." 111 F. (2d) 588, 589.

4. The decision of the court below is of large importance to the proper judicial administration of the contempt sanction, not only with respect to the National Labor Relations Act but in the broader field of administrative law generally. The court's failure to accord weight to the Board's determination that the Company refused to bargain in violation of the Act and therefore of the decree, and its reservation to itself of complete independent discretion in deciding this issue of compliance, upset the basic scheme of the relation between administrative *expertise* and the reviewing court embodied in the statute,[7] and imply a bifurcated administration of the Act, in which the doctrines governing Board action and the initial judicial enforcement of Board orders are irrelevant at the final and crucial contempt stage.[8] This anomalous

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[7] Section 10 (e); *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208–209, 226; *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318, 342–343; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 596–597; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106–107.

[8] Particularly in a case such as this, where the underlying facts are undisputed and the only question presented is the application of settled doctrine, we think the Board's de-

result is clearly contrary to this Court's repeated pronouncements that the principles applicable to judicial supervision of administrative determinations differ from those governing review of decisions of inferior courts; that in proceedings of this type the reviewing court acts coordinately with the administrative body in executing the policy of Congress; and that the court is therefore required to exercise its authority in a manner which gives due regard to the special competence of the administrative body and is calculated to build up a consistent body of doctrine in the enforcement of the statute. See *United States* v. *Morgan,* 307 U. S. 183, 191; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 141–142. Review of the present case is therefore appropriate in order that the respective duties and powers of administrative agencies and courts be clarified in this unexplored field of the contempt sanction.

5. The Court has power to review the decision in the instant case: While the tribunal which has issued a decree has discretion in deciding whether its decree has been complied with and the appropriate remedy for non-compliance, its

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termination, expressed in its petition in contempt, that the Company here failed to bargain in good faith, was entitled to presumptive validity, and the court erred in making a wholly independent determination of the issue of compliance in disregard of the principles promulgated by the Board in the exercise of its administrative *expertise.*

determination, if clearly contrary to settled law, is subject to review and correction by an appellate court. *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 112.[9]

CONCLUSION

For the foregoing reasons we submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

ROBERT B. WATTS,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1942.

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[9] *Worden* v. *Searls,* 121 U. S. 14, 26; *Enoch Morgan's Sons Co.* v. *Gibson,* 122 Fed. 420, 423 (C. C. A. 8); *L. E. Waterman Co.* v. *Standard Drug Co.,* 202 Fed. 167, 172 (C. C. A. 6). See also *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.,* 135 Fed. 774, 779–782 (C. C. A. 2); *Gordon* v. *Turco-Halvah Co.,* 247 Fed. 487; *Winchester Repeating Arms Co.* v. *Olmstead,* 203 Fed. 493, 494 (C. C. A. 7); *In re Sobol,* 242 Fed. 487, 489 (C. C. A. 2).

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Sec. 151 *et seq.*) are as follows:

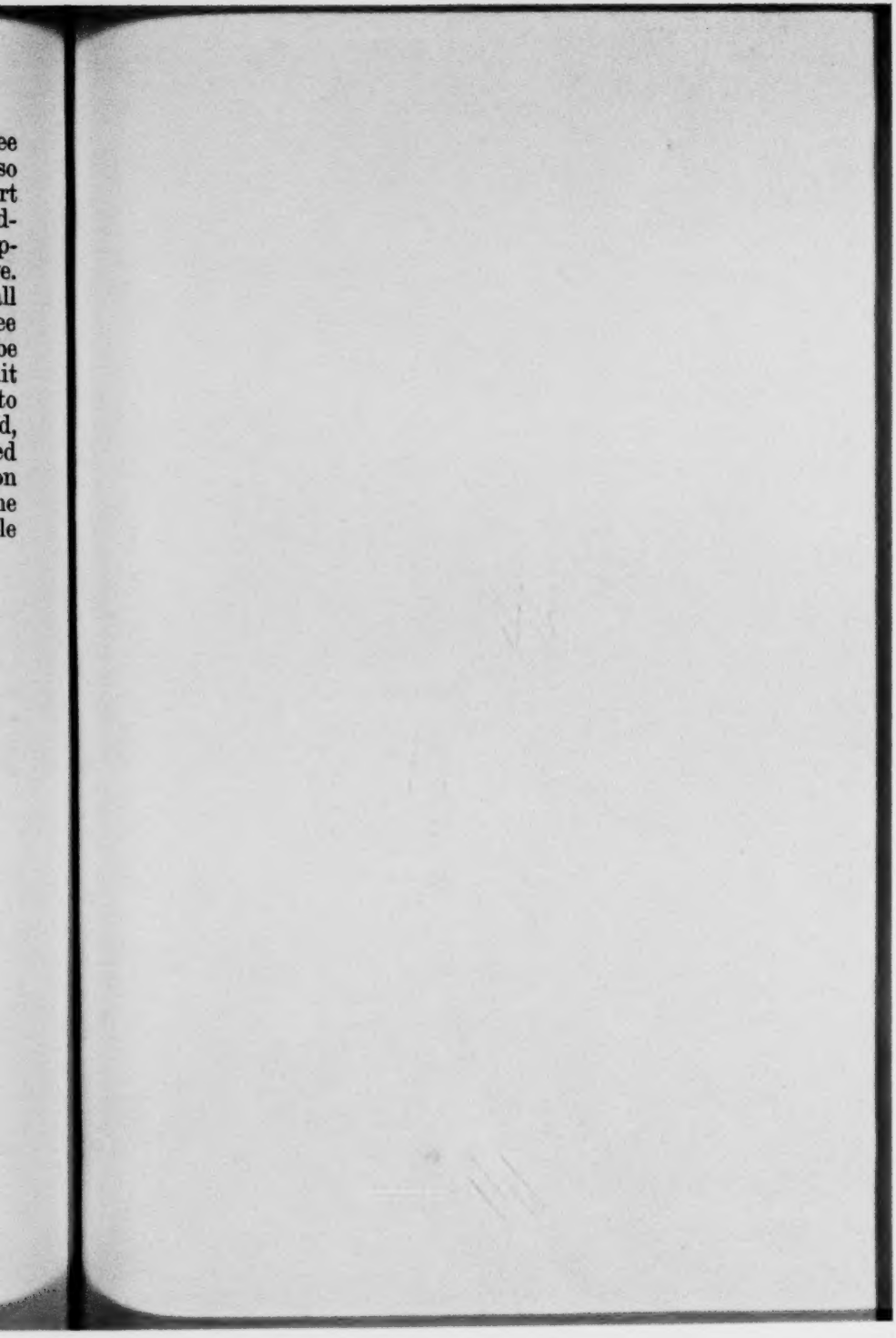
SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the district court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and pro-

ceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

U. S. GOVERNMENT PRINTING OFFICE: 1942



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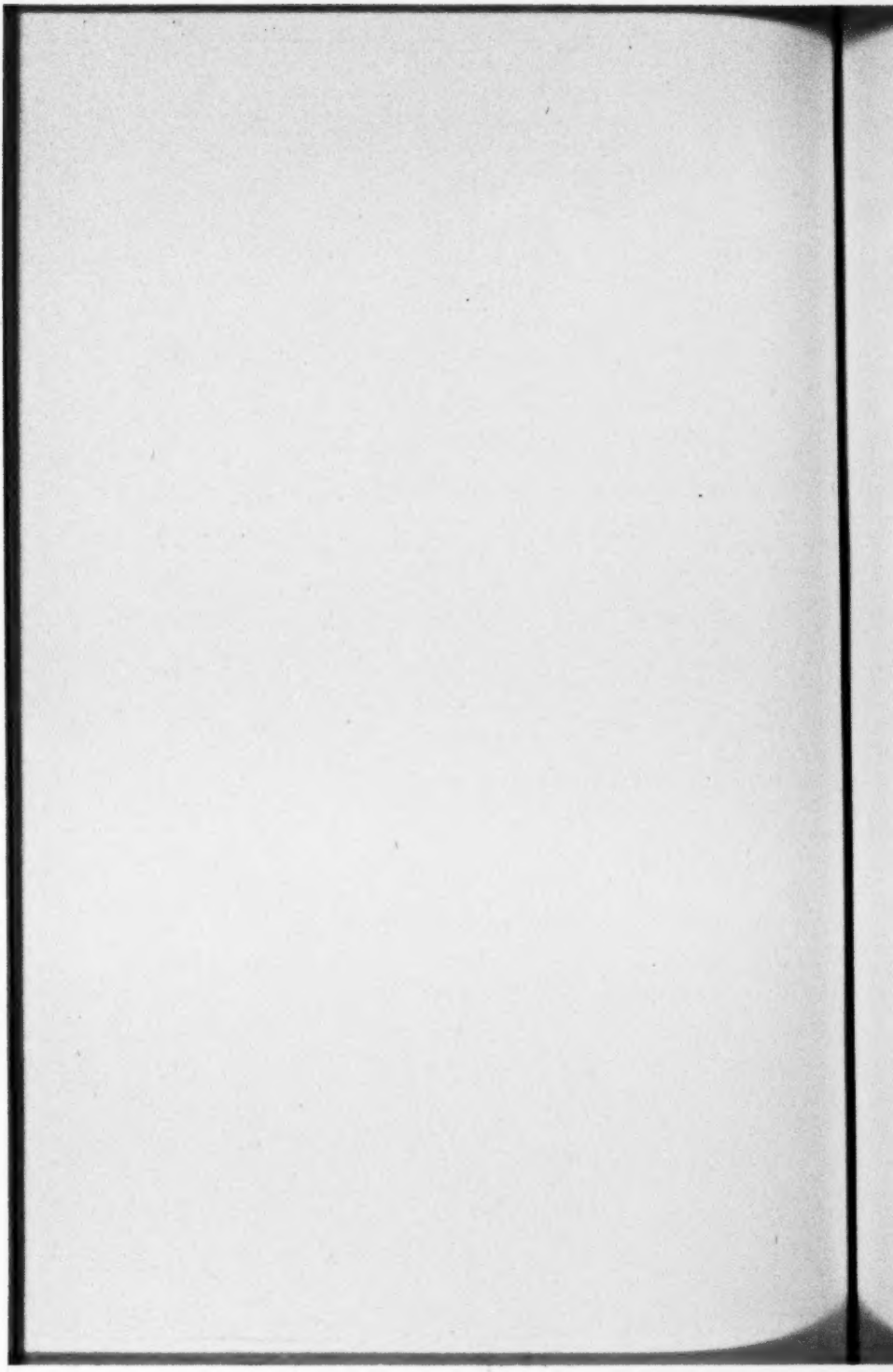


IN THE

Supreme Court of the United States

October Term, 1942.

No. 394

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

EXPRESS PUBLISHING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

1. Whether the judgment, supported by sufficient evidence, that the Respondents were bargaining in good faith and were not in contempt is subject to review by this Court.

2. Whether a judgment refusing criminal punishment for contempt is subject to review by this Court.

3. Whether the Guild, since it did not represent the majority of the employees, was entitled to bargain collectively for all the employees.

STATEMENT.

Upon the entry of the original decree in the Circuit Court of Appeals the Respondent notified the Guild of its willingness to bargain with it as the exclusive representative of the employees. The Guild did not accept the offer then. Upon entry of the second decree of the Court in accordance with the judgment of the Supreme Court, the Respondent promptly posted the notices provided for and again notified the Guild of its willingness to bargain.

The Guild submitted a proposed contract to Respondents and at a meeting asked that Respondents agree upon the holding of meetings at night. Respondents objected to that hour because that is the rush hour in the publication of its newspapers and suggested afternoon meetings. Upon the Guild's claiming both at the meeting and in circulars that more employees could attend night meetings and that they wanted all to be present and accusing Respondent of avoiding that by afternoon meetings, Respondent offered to excuse all employees from work to attend the afternoon meetings.

The Guild then submitted a proposed contract which was onerous in its terms requiring a closed shop to the extent of 9/10ths of the editorial department, fixed increases in pay depending upon longevity of service rather than on ability and efficiency, for a monopoly of employment to the persons who happened to be employed at the present time, for dismissal pay at such high rates that if Respondent quit business it would amount to more than Repondent's net worth, and other onerous terms. After a full discussion of this contract Respondent suggested that it would make a counter proposition. The Guild asked it not to do so, saying it would withdraw the proposal and submit another one. It did so and the second contract was more onerous in every particular than the first one. It provided for a completely closed shop, that new employees must be nominated by the Guild, a substantial raise in salaries over the first proposal, with the additional provision that all salaries not increased by the minimum scale should receive a flat increase, an increase in severance pay over that provided for in the first contract of approximately 50%, a provision that "there shall be no pay cuts," increase in holiday provisions, provision that any employee joining the armed forces of the United States should be re-employed upon his return without any limitation whatsoever as to time or ability to serve, and a provision that such employees should continue to receive their full salary during the period of service less any salary paid by

the Government, provision for assistance in the collection of Union dues, and a provision for six months maternity leave at full pay. The Guild made no further proposals. The Express made a proposal along the lines referred to by the Circuit Court of Appeals in its original opinion, for the continuance of employment terms as they were subject to the rights of either party to terminate at any time, the contract, however, to be a collective contract instead of individual contracts. The Guild refused that.

A reading of the record will indicate that the quotations contained in the statement in the application for writ of error are brief phrases lifted from complete sentences and do not give a fair reflection of the negotiations referred to. The opinion of the Circuit Court of Appeals will be found at pages 300-304 of the Record.

FIRST POINT.

The judgment should not be reviewed by this Court because it was based on a finding of fact that the Respondents were bargaining in good faith and that finding was supported by sufficient evidence.

ARGUMENT.

The case before the Circuit Court of Appeals turned on one of fact, whether the Respondents were bargaining in good faith. We do not agree with the Petitioner's contention that the facts are undisputed. There was a stenographic report of the meetings

and copies of circulars issued by the Guild and affidavits of both the Petitioner and the Respondents all in evidence. The facts were found by the Circuit Court of Appeals from that evidence. It was for that Court to determine from the actions and words of the parties as reflected by the record and from the evidence filed before it the conclusions of fact as to the intentions and good faith of the parties. It had evidence before it that the Guild had submitted a contract containing provisions that Respondents were very much opposed to; that it then immediately withdrew that proposal and submitted a second proposal increasing its demands in every particular far above those in the original proposal. There were just two conclusions to come to about that: Either that the Guild had changed its mind and wanted to demand more even though it already knew that Respondent was opposed to granting the first proposal; or, that the Guild was acting in bad faith and wanted to present a proposal that it was sure would not be accepted voluntarily. It could consider the evidence that at the very outset the Guild demanded that all employees be present and when Respondents acceded to their request of closing down the work so that all employees could attend the meeting, the Guild filed a complaint before the Labor Board claiming the employees had by this action, taken at the Guild's own request, been coerced to attend the negotiations, and also made numerous other complaints before the Board in an effort to

coerce the Respondent into agreeing to terms that it did not voluntarily believe were best for itself or for the employees. (R. 273-7). The evidence shows that throughout the negotiations the employer conducted the negotiations in a dignified manner seeking to reason with the Guild negotiators, while the Guild negotiators adopted just the opposite manner, indulging in threats, ridicule and undignified conduct. The Court could consider the fact that while the Guild was insisting upon the employer binding itself for a considerable length of time, it uniformly insisted that the employees, either individually or collectively, should have the right to quit any day they pleased. (R. 182). The employer was simply proposing that the right of termination be mutual instead of merely the employees' privilege. In response to the Guild's charges of bad faith against the employer because it did not agree to any increase in wages, it could consider the statements made by it in the negotiations that it was already paying the highest average wages of any concern of substantial size in the City and the reply of the Guild negotiator (Record page 251): "I dare say that it is probably true in Texas as it is true in many other States that the average hourly rate of the printing and publishing industry is frequently the highest rate of any industry in the State," but stating that that was irrelevant and nobody would be impressed with that argument. It could consider the claims the Express made, the denial on the part of the Guild in the

negotiations, that it was paying more wages now than in 1929 at the height of the boom, but had less advertising, and that it was now paying the peak of all wages it had ever paid. (Record pages 132-3, page 215). All the occurrences from which conflicting deductions might have been drawn are too numerous to describe here. While the words used by the parties and their actions on each occasion were not in dispute, the conclusions to be drawn from those words and actions were the questions of fact in dispute. The Court below considered the record and stated that

> "The only question presented for decision is whether the Company endeavored to bargain in good faith * * * in conformity to the judgment. In deciding that question we are entitled to draw our own conclusion from the facts in the record."

The Court discussed the facts and concluded that the Respondents were bargaining in good faith, and that the allegations of contempt were not sustained by the proof. Thus it found the disputed issue of fact in favor of the Respondents. That issue of fact was all that was decided. Being supported by sufficient evidence it should not be reviewed here.

The Petitioner criticizes the Court's reference to the demand for a closed shop and assistance in collecting Union dues and participation by the Guild in choosing employees, saying they were not required by law. That reference of the Court must be

read in connection with the position taken by the Petitioner before the Court below. There the Petitioner contended that the Respondent was in bad faith as a **matter of law** because it did not agree to any of those provisions in the contract, and the Court was merely pointing out that the employer, while it was obligated to bargain collectively in good faith, was not obligated by law to agree to those terms and that the Guild when it first demanded a partially closed shop and part of the other provisions and then raised the proposal to a completely closed shop, etc., was not trying to be reasonable.

Petitioner is now taking the position before this Court that **as a matter of law** it constitutes bad faith for an employer in negotiating to offer a contract that is subject to termination by either party at will. The Guild insisted that it reserve the right to every individual employee and all of them collectively to quit the employment or strike at any time. They had a right to bargain for those terms; but it is not as a matter of law bad faith for the employer to bargain for similar terms.

The employer is criticized for objecting to a closed shop. The record shows that the mechanical departments have always had closed shops in Respondent's business, agreed to willingly by the employer, but that the employer objected to agreeing to a closed shop with the Guild giving the Guild the right to nominate for employment all workers and discharge all editors who will not join the Guild,

because it was unwilling to surrender its power to employ and discharge or choose its editors to carry out the publisher's editorial and news policies. A publisher cannot write an entire newspaper himself; he must depend upon his editorial and news policies being carried out by the editorial employees. A contract exempting employees from discharge and pay cuts to a large extent would free the employees from the publisher's control of his editorial and news policies and leave the employees in a position to dedicate the newspaper to those editorial and news policies advocated by the Union rather than those advocated by the publisher. The employees then would be free to voice the Union's policies on war or peace, taxation, public expenditures, candidates for office, etc., on most of which that Union's opinions and this newspaper's opinions have differed. It is noteworthy that when the framers of the Constitution desired to make the courts entirely free of the executive they denied to the executive the power to remove the judiciary or reduce the compensation. And Alexander Hamilton, Federalist No. 78 and 79, reasons that these measures most effectively free the judiciary from executive control. The Union adopted exactly the same measures to free the editorial employees from the publisher's control of the opinions to be expressed in their writings. The Union was entitled to bargain for the control of this newspaper. It is a valuable stake to bargain for. It is the principal newspaper in the south half of the

largest State in the Union. If won it could be used to voice the Union's policies upon the great public issues of the day and attack on their own home ground those outstanding leaders in Congress from Texas who do not always go along with the Union on either foreign or domestic policies. Of course the Union could bargain for it. But the publisher was also entitled to bargain for the retention of the control of that editorial policy by proposing that he retain the right to dismiss employees and raise or reduce their compensation—the other parties to have the corresponding right to terminate the contract.

It is contended that it was bad faith **as a matter of law** for the employer to bargain for a difference in the terms of employment for professional employees, such as the editorial writers and employees in the mechanical departments. The employer urged that rigid seniority scales and rules for compensation, employment, etc., should not be applied to professional services and that each party should reserve freedom of termination at pleasure. It should not be held that it was bad faith as a matter of law for the Respondent to offer a form of contract which the great majority of men have freely chosen as the most acceptable form in which to couch their relationships. The great mass of the people in the United States are employed under oral or written agreements where either may terminate the relationship at pleasure, and may demand a variation in the terms at pleasure and terminate the relationship if the other does not accept. That situation applies

not only as to employer and employee, but as to the great mass of other contractual relationships. Telephone, gas and other public services are commonly purchased under such contracts. Customers of banks, department stores and manufacturing establishments are upon the same basis. Partnership contracts are generally subject to termination by any partner at will. Who ever heard of lawyers contracting to be partners except subject to termination by any at pleasure? The same generally applies to doctor-patient and lawyer-client contracts. The negotiators for the Express pointed out that everyone of themselves was employed by the Express under a contract terminable at will by either party and had been so employed for a long period of years, and that they would refuse any other type of employment for themselves, deeming a terminable contract to promote better relationship, especially in professional work, and in the long run greater security; for neither party would be likely to want to terminate at the first lawful opportunity a contract which would not act as a shackle. The Guild had a right to propose a contract which would bind the employer, reserving to their members, collectively and individually, the right to quit at any time, but it was not improper for the Express to request that it have also the same privilege of terminating the contract.

The facts have been tried by the Court below and it has found as a fact that the proposals made by

the employer were made by it in good faith. It should not be held here as a matter of law that the offer of the employer was in bad faith.

SECOND POINT.

The judgment should not be reviewed in this Court because it was one refusing to punish the parties for criminal contempt and not one refusing to enforce the original decree.

ARGUMENT.

What the Court did here was to refuse to punish the employer and its officers for alleged contempt of Court, finding that they had acted in good faith and were not in contempt. It did not purport to relieve the parties of their continuing obligation to bargain under the Wagner Act and the Court's former decree. On the contrary, it expressly pointed out the decision in the Belo case for further guidance of the parties in future bargaining. The judgment of the Court below, therefore, fell within the class designated as judgments concerning criminal contempt which are not reviewable by an appellate court.

The distinction is set out in **Wingert v. Kiefer,** 29 Fed. (2d) 59. There the trial court in a civil case had enjoined the sale of some pledged shares of stock. The sale was made despite the order. The trial court upon motion to punish the parties for contempt heard the motion and dismissed the charge

of contempt. The Circuit Court of Appeals held that it was clear that the parties had disobeyed the trial court's order, but that the question adjudicated by the court was whether it would punish the parties for contempt and that such a proceeding was in "criminal contempt" and an order exonerating the respondents cannot be reviewed by an appellate court.

Here likewise the question adjudicated by the Circuit Court of Appeals was whether the actions thus far taken by the Respondents merited punishment for contempt. The Court found that the actions were taken in good faith and did not merit such punishment. It indicated clearly, however, that the parties were not relieved from obligations to bargain, stating further rules for limitations upon their rights in such bargaining by referring to the Belo case, another newspaper case decided recently by the Supreme Court.

THIRD POINT.

It being undisputed that the Guild never represented a majority of the employees, it was not entitled to bargain collectively for the employees.

ARGUMENT.

Throughout the proceedings in the original case the negotiators for the Guild (not employees of the Express) stated that the Guild represented a ma-

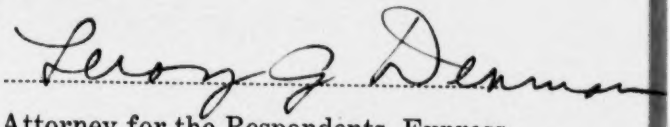
jority of the employees. Their statement was believed without question by the employer throughout all of those proceedings. At the commencement of the negotiations following the decree in the original case, the negotiators (again not employees of the Express) again stated that the Guild represented the majority of the employees. After the negotiations had terminated, however, and before the hearing of this contempt proceeding, it was disclosed by the Guild that it did not and does not represent a majority of the employees. (Record page 299). That was shown by the sworn affidavits filed by Respondent and was not denied by the Petitioner, Petitioner simply contending that such showing came too late.

It would be a mockery of justice to require negotiation with persons now conceded never to have represented a majority of the employees. It would permit the minority to control the majority, the very opposite of what was contemplated by the Wagner Act. Those employees were never parties to any of these proceedings and should not be bound by the acts of representatives not of their own choosing.

CONCLUSION.

The questions before the Circuit Court of Appeals and presented by Petitioner being purely questions of fact decided by that Court upon sufficient evidence, we respectfully submit the Writ should be denied. Furthermore, if this Court should decide

that a review of the facts is within its purview, then we respectfully submit that the Circuit Court of Appeals' findings upon the facts were correct and the Writ should be denied.



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